



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 27, 2022

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BOARD DECISIONS

Appellant: Bradley S. Sikes

Agency: Department of the Navy

Decision Number: [2022 MSPB 12](#)

Docket Number: SF-0752-16-0813-I-1

Issuance Date: May 23, 2022

Appeal Type: Adverse Action by Agency

Action Type: Suspension - Indefinite

Jurisdiction

Indefinite suspension

The agency indefinitely suspended the appellant after suspending his access to classified information. In doing so, the agency indicated that his suspension would end upon the restoration of his access to classified information. The appellant did not file a Board appeal regarding the imposition of the indefinite suspension. More than a year later, the appellant's access to classified information was restored, but the appellant did not return to duty until 13 days later. At that point, the appellant filed his Board appeal. The administrative judge found that even if the 13-day delay constituted a constructive suspension, the Board lacked jurisdiction over the matter.

Holding: The Board granted the appellant's petition for review, vacated the initial decision, and remanded for further proceedings on the merits.

1. When the appellant filed this appeal, the agency had executed documents showing that his indefinite suspension began on June 18, 2015, and ended on August 29, 2016, 13 days after the restoration of his access to classified information. After the filing of the appellant's appeal, the agency took steps to retroactively place him in an LWOP status for those 13 days. But the Board's jurisdiction is determined by the nature of an agency's action against an appellant at the time his appeal is filed. Accordingly, the matter at hand was the continuation of the appellant's indefinite suspension after the restoration of his access to classified information.
2. The length of the entire indefinite suspension is considered for purposes of Board jurisdiction over the continuation of an indefinite suspension. Even if the appellant was only challenging the 13-day period between the agency restoring his access to classified information and his return to duty, that length of time is not determinative. Accordingly, the Board had jurisdiction over the matter.
3. The Board's role in an appeal such as this is to determine whether the condition subsequent identified by the agency occurred and whether the agency then acted within a reasonable amount of time to terminate the indefinite suspension. Here, the condition subsequent did occur but remand was required to develop the record and determine whether the agency acted within a reasonable amount of time to terminate the indefinite suspension, particularly because there were some unresolved questions about whether the 13-day delay in returning him to duty was for the appellant's own personal reasons or for him to complete work-related training.

Appellant: Roseanne H. Cronin

Agency: United States Postal Service

Decision Number: [2022 MSPB 13](#)

Docket Number: DE-0353-15-0381-I-1

Issuance Date: May 24, 2022

Appeal Type: Restoration to Duty

Action Type: Restore After Recover of Comp Injury

Jurisdiction

Restoration

The administrative judge dismissed the appellant's restoration appeal as a partially recovered employee, without holding a hearing, because the appellant failed to nonfrivolously allege that the agency acted arbitrarily and capriciously

in denying her request for restoration. She further found that the Board lacked jurisdiction over the appellant's claims of disability discrimination absent an otherwise appealable action.

Holding: The Board affirmed as modified. In doing so, the Board overruled *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400 (2012) and its progeny regarding (1) the relevance of internal rules that exceed the regulatory requirements when considering the arbitrary and capricious element of an appellant's burden and (2) the suggestion that a claim of unlawful discrimination or reprisal could serve as an independent basis for showing that a denial of restoration was arbitrary and capricious.

1. To establish jurisdiction over a restoration claim as a partially recovered employee, the appellant must make nonfrivolous allegations concerning four elements, one of which being that the denial of her request for restoration was arbitrary and capricious.
2. A denial of restoration is arbitrary and capricious if, and only if, the agency failed to meet its obligations under 5 C.F.R. § 353.301(d). The *Latham* decision deferred to an advisory opinion by OPM, which interpreted the regulation as requiring that an agency also comply with its own rules that provide additional protections or benefits to an employee, beyond those provided in the regulation. The Board disagreed, finding that OPM's interpretation was plainly erroneous and not entitled to deference. In doing so, the Board determined that OPM's advisory opinion effectively claimed for itself the authority to redelegate a significant portion of its statutorily granted rulemaking authority to outside parties when Congress had not authorized it to do so.
3. An agency may still undertake restoration efforts beyond those required by the regulation, but its failure to comply with self-imposed obligations cannot itself constitute a violation of section 353.301(d) and render a denial of restoration arbitrary and capricious for purposes of a Board appeal.
4. *Latham* also suggested that a claim of unlawful discrimination or reprisal for protected activity could serve as an alternative means of showing that a denial of restoration was arbitrary and capricious. The Board found that this holding was incorrect. Determining whether an agency met its obligations under section 353.301(d) will turn on whether it made every effort to restore a partially recovered employee in the local commuting area and according to the circumstances in each case. If an agency makes that effort but is unsuccessful, the denial of restoration is not arbitrary and capricious, and its lack of success cannot be attributed to any improper motive. Conversely, if an agency fails to comply with section 353.301(d), the resulting denial of restoration is arbitrary and capricious, and no further analysis of the agency's motive is required.

5. In this case, there was no allegation or evidence suggesting that the agency failed to meet the obligations of section 353.301(d). Therefore, the Board lacks jurisdiction over the appeal. The Board also lacks jurisdiction over the appellant's claim of disability discrimination.

COURT DECISIONS

NONPRECEDENTIAL:

AFGE Local 3438 v. Social Security Administration, [No. 2021-1972](#) (Fed. Cir. May 25, 2022) The court dismissed for lack of jurisdiction the union's challenge of an arbitrator's decision to deny its request for attorney fees after it had successfully represented an employee regarding her indefinite suspension.

Bautista v. MSPB, [No. 2022-1500](#) (Fed. Cir. May 26, 2022) The court dismissed the appellant's appeal, which would have challenged the decision of an administrative judge regarding her application for an annuity, because her appeal was untimely.

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